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In The

SUPREME COURT OF THE UNITED STATES

January Term 1975

NO. 74-1363

IN THE MATTER OF: OAK CLIFF-GOLMAN BAKING COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

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No.....

IN THE MATTER OF: OAK CLIFF-GOLMAN BAKING COMPANY,

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 3, 1975.

JURISDICTION

The Judgment of the Court of Appeals was entered January 3, 1975. The Petition for Rehearing was denied February 7, 1975. This Petition for Certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 USCA Section 1254(1).

OPINIONS BELOW

The National Labor Relations Board Order was entered December 26, 1973 (207 N.L.R.B. 138). Respondent filed Petition for Enforcement in the Fifth Circuit. The Court of Appeals entered its Judgment without opinion January 3, 1975 unreported. The Petition for Rehearing was overruled February 7, 1975. The Appendix filed in the United States Court of Appeals for the Fifth Circuit will be forwarded to this Court under Rule 21(1) of the Supreme Court Rules.

QUESTIONS PRESENTED

(1) Whether the decision of the National Labor Relations Board, and approved by the Court of Appeals, that there is a violation of 8(a)(5) of the National Labor Relations Act, as amended, based solely on a breach of a union contract, is in conflict with cases in the Supreme Court of the United States and the various circuits of the United States Court of Appeals holding that a breach of contract is not an unfair labor practice?

(2) Whether the decision of the National Labor Relations Board, approved by the Court of Appeals, in holding that the dispute was not arbitrable is in conflict with various decisions of the Supreme Court of the United States and other Courts of Appeals?

(3) Whether if the union failed to pursue its grievance to arbitration, it cut itself off from any back pay awards?

(4) Whether Petitioner being in dire financial condition, and the Union contract being executory, and 95% of its Union employees approved, could reduce wages to avert closing its business without being in violation of the National Labor Relations Act, as amended?

NOTE

Unless otherwise specified in this Petition, the following references will be used: Petitioner refers to Oak Cliff-Golman Baking Company. Respondent refers to National Labor Relations Board. N.L.R.A. refers to National Labor Relations Act, as amended. Union refers to Bakery & Confectionery Workers International Union of America - AFL-CIO and its Local 111 of Dallas, Texas. "A" refers to Appendix.

STATEMENT OF THE CASE

Petitioner was a party to a multi-employer contract dated September 9, 1970 with the Union. The contract expired July 22, 1972. Five other bakeries in Dallas were parties to the contract. Part of Petitioner's plant, such as sales department and transport drivers, were not covered by the agreement. In October, 1971, Petitioner was in dire financial condition which was stipulated. It either had to cut its costs or close its doors. It reduced wages of employees not covered by the Union contract by 10% and such employees received no raise in July, 1971. Union members, however, received a 35 cent per hour raise July 1, 1971. Petitioner met with Union Representatives on October 5, 1971, and proposed to cut back Union employees' wages by 35 cents an hour. The Union representatives, although sympathetic, did not agree. On October 8, 1971, Peti-

tioner met with the same Union representatives and the International Vice President of the Union and could not agree. The Union hierarchy would not follow its members' lead. It appeared that their difficulty was they feared a reduction of wages by one party to the multi-employer contract might cause requests for similar reductions by other bakery companies to such contract. This was conjecture on the Union's part. There was never any question raised as to the good faith of the Petitioner, who offered full disclosure of its financial condition. On October 12, 1971, it held meetings with its union employees. 95% of its union employees were in favor of the cut in wages. All management took sizeable cuts in pay. At the time the industry was in a slump and jobs were not available. It also met with the working foremen. The cut back started with

the October 14th payroll. Approximately 100% of the union employees remained at work. The union filed a grievance with Petitioner on October 18, 1971, and thereafter on October 22, 1971, filed a charge with the Respondent. On November 23, 1971, the Respondent issued a complaint alleging violations of Sections 8(a)(1) and 8(a)(5) of the N.L.R.A. (29 U.S.C.A. 158), "A" (to be supld.) After a hearing on December 14, 1971, the Administrative Law Judge entered his decision of January 26, 1972, and the Respondent entered its decision and Order on March 21, 1973. Meanwhile on January 17, 1972, Petitioner filed a Chapter XI Bankruptcy Petition in Dallas.

Petitioner was held to have violated 8(a)(1) and (5) of the N.L.R.A. and ordered to pay back the reduced wages plus interest. Timely exceptions were made

by the Petitioner to the Trial Examiner's Decision, and Petitioner made a Motion for Reconsideration of the Decision of the Respondent, which was overruled. Petitioner filed a Petition for Review in the Appeals Court (Case No. 73-2101), and upon request of the Respondent the case was remanded to the Respondent. Its second decision and Order was dated December 26, 1973 (207 N.L.R.B. 138). Petitioner filed its Motion for Reconsideration and Rehearing which was overruled. The Respondent then petitioned for enforcement in Court. The Court of Appeals, without opinion, granted enforcement of the Respondent's Order and Decision on January 3, 1975 (unreported), ("A" 2&3). A Motion for Rehearing was timely filed and denied by the Court of Appeals on February 7, 1975.

REASONS FOR GRANTING WRIT

1. There are conflicts between the decisions of the Court of Appeals and Supreme Court and other Courts of Appeal with respect to (1) and (2) of the questions presented.

2. Because of the importance of questions (3) and (4) there appear to be no cases involving the rights of a union to file a grievance and invoke the arbitration procedure and subsequently four days later to file an unfair labor charge on the same grounds with the Board. Under such circumstances, can the Board decree back pay, or is the Board limited to determine the unfair labor charges? Is the Union estopped from filing such unfair labor charges? The modern rule of impossibility of performance because of circumstances beyond Petitioner's control subsequent to the signing of the Union

contract should relieve Petitioner from having to pay back wages. The fact that a union can arbitrarily impose contractual standards unilaterally on a company that its own members overwhelmingly disagree with (by imposing the contract on a company faced with bankruptcy) is violative of the Law of Contracts. That is to say, when a contract of wages becomes so burdensome to the continuance of business conducted by management that rank and file union members realize this and over 95% agree to a reduction of wages so that the business might survive it should not be classified as an unfair labor practice. The Union should not be allowed to enforce its contrary will on the company and its own members.

Hence the Order appealed from herein directing back wages with interest is unjust and inequitable and violative of

tne Law of Contracts. An executory contract cast upon management the duty to pay the wages only until such time as the contract was modified or breached. The agreement of the rank and file members constituted such a modification and their officers should be bound thereby.

The Employer should have a right, after consulting the Union and getting members consent, to reduce wages in order to stay in business. Especially where 95% of its Union employees are in favor of the wage cut rather than being thrown out of work in a depressed labor market. Management and non-union workers took paycuts. The Act was designed to further the rights of employers and employees so that there would be a harmonious relationship between them. It was not designed to force an employer into bankrupty or reorganiza-

tion under Chapter XI because a union refuses to agree to a wage reduction although 95% of its members favor such reduction. This rule has been applied to bargaining before a contract is executed. N.L.R.B. v. Minute Maid (5th circuit), 283 F2d 705. It should be extended to include a contract after its execution.

A breach of contract standing alone is not an unfair labor practice (under question (1) above).

The Supreme Court has held that a breach of contract is not per se an unfair labor practice. Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437; Drake Bakeries v. American Bakery, 370 U.S. 254.

The only allegation in the complaint and the proof was that the breach of contract was a refusal to bargain. The Board took this position. Contrary to this assumption, the Petitioner actually bargained with the Union which refused to agree to a reduction in wages. Cases in other circuits follow the rule in the Supreme Court cases. N.L.R.B. v. M & M Oldsmobile, Inc. (2d Circuit), 377 F2d 712; N.L.R.B. v. Pennwoven, Inc. (3d Circuit), 194 F2d 521; International Machinist v. Cameron Iron Works (5th Circuit), 257 F2d 467, cert. denied, 358 U.S. 880; Cheney California Lumber v. N.L.R.B. (9th Circuit), 319 F2d 375; Amalgamated Clothing Workers v. N.L.R.B. (District of Columbia), 343 F2d 329. In these cases it is said that a breach of a collective bargaining agreement is not invariably equated with unfair labor practices. A breach of contract standing alone is not a viola-

tion of 29 USCA 158(A)(5). Petitioner did not act before consultation and bargaining with the Union. It sought permission to reduce wages. The Union refused. Up to this point, there was no unfair labor practice. Indeed, it was bargaining in utmost good faith. The Petitioner put the wage decrease in effect. Then only could an alleged unfair labor practice have occurred. Petitioner is chargeable at most with a breach of contract. A breach of contract standing alone is not a refusal to bargain.

The Union filed a grievance with the Board and thereafter filed an unfair labor charge. It involved the grievance procedure. The Agreement (Article XIV) provides:

> "Grievances shall consist of disputes arising between the employer and the union and/or employee concerning the interpretation and application of the provisions of this Agreement."

This is a very general arbitration clause, and the function of the Court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the party is right or wrong is a question of contract interpretation by the arbitrator. The Court cannot weigh the merits of the grievance. In United Steel workers v. American Mfg. Co., 363 US 564, the Court says:

> "The function of the Court is very limited when the parties have agreed

> to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator ...
>
> "The courts, therefore, have no business weighing the merits of the grievance ...
>
> "The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

Under the grievance clause all grievances, if not settled, must be submitted to arbitration and are arbitrable. In United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 US 574, the Supreme Court says:

> "The collective agreement covers the whole employment relationship. It calls into being a new common law ...

> "... all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process...
>
> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Petitioner in such arbitration could raise any defense, including the fact that Respondent bargained in bad faith; 95% of the employees were willing to take a wage cut rather than be thrown out of work in a depressed labor market in the industry; and the inability to pay under an executory contract where subsequent events make it impossible to pay. Gateway Coal Co. v. Mine Workers of America, 38 L. Ed. 2 583. Drake Bakery v. Local 50, 370 U.S. 254. Dowd Box Co.

v. Courtney, 368 U.S. 502.

The decision of the Board is contrary to the following cases in the Courts of Appeal: N.L.R.B. v. Standard Oil (6th Circuit), 196 F2d 892. Brass & Copper Workers Federal Labor Union v. American Brass Co. (8th Circuit), 272 F2d 849. Provision House Workers Union v. N.L.R.B. (9th Circuit), 493 F2d 1249, in which it is said a reduction in wages is arbitrable. Nabisco v. N.L.R.B. (2d Circuit), 479 F2d 770, e.r. Urban Communication Workers v. Pacific Bell (9th Circuit), 337 F2d 455.

A collective bargaining agreement is an executory contract. An executed contract is one where it has been fully performed by one party. An executory contract is one with respect to which something remains to be done by both

parties. Lammers v. Wolfertz, 164 SW2d 1102, e.r. The contract in question requires services in the future by the Union and its members and payment of future wages by the Petitioner. Executory contracts are subject to the impossibility of performance. Salter v. Jones, 348 SW2d 381; Erickson v. Rocco, 433 SW2d 746; Langdeau v. Pittman, 337 SW2d 343; 84 ALR2d 12. In Albertville v. U.S. Fid. & Guar. Co., 272 F2d 594, it is said:

> "The district court, in its charge, adopted what is referred to by Professor Williston as 'the modern defense of impossibility,' to the effect that '...impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.'"

In Restatement of Contracts, Sec. 457, it is said:

> "...where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation ... ."

The award of back pay by the Board is unwarranted, since there was no refusal to bargain. The question of back pay is a matter to be decided by the arbitrator. There cannot be two awards; otherwise, there would be double damages.

The Union cannot go both ways. The record is silent as to whether the Union pursued its grievances through arbitration. While it is true that the Board may and did enter an Order on the unfair labor charges, it could not award back pay. That was up to arbitration. If

the Union failed to pursue its grievances, it is not entitled to an order on back pay. There is a vast difference between an order of the Board finding a violation of 8(a)(1) of the Act and decreeing how Petitioner is to comply, and entering a back pay award which will run into thousands of dollars plus interest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

EMIL CORENBLETH
Of Counsel

APPENDIX

29 USCA Sec. 158, Unfair Labor Practice:

"(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

OAK CLIFF-GOLMAN BAKING COMPANY,

Respondent

NO. 74-1850

JUDGMENT

Before: TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

This cause came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Oak Cliff-Golman Baking Company, its officers, agents, successors, and assigns, on March 21, 1973, as re-affirmed December 26, 1973. The Court heard argument of respective counsel on December 11, 1974, and has considered the briefs and transcript of record filed in this cause. On December 12, 1974, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the

National Labor Relations Board in said proceeding be enforced, and that the Respondent, Oak Cliff-Golman Baking Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: January 3, 1975

Issued as Mandate: February 18, 1975.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-1850

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

OAK CLIFF-GOLMAN BAKING COMPANY,

Respondent

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(December 12, 1974)

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21. [1]

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F2d 966.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-1850

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

OAK CLIFF-GOLMAN BAKING COMPANY,

Respondent

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

ON PETITION FOR REHEARING

February 7, 1975

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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MAY 12 1975
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NO. 74-1363

OAK CLIFF-GOLMAN BAKING CO.

VS.

NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL APPENDIX PP. 6-17

(ORDER OF THE BOARD)

207 NLRB No. 138 D-8263
Dallas, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OAK CLIFF-GOLMAN BAKING COMPANY

and

BAKERY & CONFECTIONERY WORKERS
INTERNATIONAL UNION OF AMERICA,
AFL-CIO, LOCAL NO. 1111

Case 16-CA-4532

SECOND DECISION AND ORDER

On March 21, 1973, a panel of the National Labor Relations Board composed of Members Fanning, Jenkins, and Penello issued its Decision and Order in this proceeding finding in agreement with the Decision of Administrative Law Judge Henry L. Segal[1] that Respondent had violated Section 8(a)(5) and (1) of the Act.[2] Thereafter, Respondent filed with the United States Court of Appeals for the Fifth Circuit a petition to review the Board's Order.

---

1. The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

2. 202 N.L.R.B. No. 72.

On August 24, 1973, while the case was pending before the Court, the Board, sua sponte, requested the Court to remand the case to it for further consideration. On September 12, 1973, the Court granted the request. Thereafter, Member Penello excused himself from participating in the decision and the Board decided that the case should be considered de novo by a panel composed of Chairman Miller and Members Fanning and Jenkins. Accordingly, and pursuant to Section 3(b) of the National Labor Relations Act, the Board duly delegated its authority in this proceeding to a panel composed of the three members named supra.

The Board has considered the entire record in the case and the Decision of Administrative Law Judge Henry L. Segal in light of the exceptions and briefs, and has decided to affirm the rulings,

findings, and conclusions of the Administrative Law Judge, to the extent consistent with the decision herein, and adopt his recommended Order.

The complaint alleged, the Administrative Law Judge found, and we all agree that Respondent unilaterally modified its collective-bargaining contract with the Union within the meaning of Section 8(d) of the Act and thereby violated Section 8(a)(5) and (1) of the Act. The relevant facts are undisputed.

At all times here relevant, Respondent was a party to a bargaining contract with the Union which was effective by its terms until July 22, 1972, and which covered its employees as part of a multiemployer unit. In
3.
October 1971, Respondent's business

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3. Unless otherwise stated, all dates hereafter mentioned are for 1971.

faced a dire financial crisis. Respondent decided that, rather than close its operations and lose good employees, it would attempt to remain in operation by reducing the wages and salaries of all its employees. It informed the Union of its financial plight and of its wage reduction decision at meetings held October 5 and 8, and asked for the Union's "blessings." The Union refused to agree to the wage cuts primarily because it did not wish to open the contract's provisions with respect to other employees in the multiemployer unit. Respondent nonetheless implemented its decision and, commencing with the payroll of October 14, began paying its employees both in the unit and outside of it at reduced rates of pay. On October

18, the Union filed a formal grievance about Respondent's reduction of the wages of the unit employees and, on October 18, it filed the charge initiating this proceeding.

In resisting the complaint, Respondent sought at the outset to obviate any decision on the merits on two grounds. We discuss each seriatim.

First, Respondent claimed that the policy enunciated by the Board in Collyer Insulated Wire, A Gulf and Western Systems Co., 192 NLRB 837, required deferral of the basic differences between Respondent and the Union in this case to the contractual grievance-arbitration procedures which, as noted supra, the Union had invoked before it filed the charge herein. The Administrative Law Judge rejected this claim. Although all of us agree his con-

clusion was proper, Chairman Miller differs with his colleagues as to the proper predicate for that conclusion. He would find, in agreement with the Administrative Law Judge's reasoning, that deferral is inappropriate in this case because there is no claim, and indeed no room for any finding, that the contract's terms even arguably authorized the action taken by Respondent here. Obviously therefore, unlike Collyer, the question of whether Respondent's action was in violation of its statutory obligations does not turn on any underlying dispute over the meaning of the contract's terms. Chairman Miller would not, therefore, find that determination of the violation issue in this case on its merits conflicts with the policy enunciated in Collyer. As Members Fanning and Jenkins do not, however, subscribe to the

policy enunciated in Collyer (for reasons they have expressed in their dissent in that and in subsequent cases), they would not defer to arbitration here in any event.

Next, Respondent claimed that its action in reducing wages was at most a breach of contract with the Union of a kind which Congress has indicated should be remedied by other processes and ultimately by the courts.[4] The Administrative Law Judge rejected this claim as well. All of us agreed he did so properly, not only for the reasons set out in his

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4. Respondent here refers to certain statements contained in the House Conference Report (No. 510, p. 41) on the Taft-Hartley Amendments to the Act (H.R. 3020), and to the Board's acknowledgment, in its decisions, that a breach of contract is not ipso facto an unfair labor practice. See e.g. American Vitrified Products Company, 127 NLRB 701; United Packinghouse Workers of America, CIO, and Locals 49, 86, 93, 102 and 104 (Wilson & Co.,Inc., 89 NLRB 310.

Decision but also for the following additional ones.

It cannot be gainsaid that an employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective-bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the

contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions- the establishment and maintenance of a viable agreement on wages.

Turning to the merits, Respondent alleges there is no room in the facts for any finding that its conduct violated the "good-faith" bargaining standards imposed upon it by the Act. It urges, in this respect, that its sole motive and intent in reducing wages was to meet an economic crisis;

that its action in fact had the salutary effect of preserving for employees jobs they would otherwise have lost; and that it advised the Union fully of all the reasons for its action and of the financial facts supporting it. We have no doubt that Respondent's description of its motive and its object is a truthful one. But we have here a situation where these considerations are irrelevant. The unambiguous language of Section 8(d) of the Act explicitly: (1) forbade Respondent's midterm modification of the contract's wage provisions without the Union's consent; and (2) granted the Union the privilege it exercised to refuse to grant consent. No where in the statutory terms is any authority granted to us to excuse the commission of the prescribed action because of a showing

either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable eccnomic objective. To borrow the words of the Supreme Court, what must here be recognized is that "(t)he law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts (and of the Board) cannot be set up against it in the supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results." Standard Sanitary Mfg. Co. v. U. S., 226 U.S. 2049. From all this, it follows that Respondent's unilateral modification of the wage provisions of its contract violated Section 8(a)(5) and (1) of the Act as alleged.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommendation Order of the Administrative Law Judge and hereby orders that Respondent, Oak Cliff-Golman Baking Company, Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C. December 26, 1973.

Edward B. Miller, Chairman

John H. Fanning, Member

(SEAL) Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD